SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-589

GUY DI VIAIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN G. WOLSCHINA
518 Market Street
Camden, New Jersey 08101
(609) 365-5100

JACOB KOSSMAN
1325 Spruce Street
Philadelphia, Pennsylvania 19107
(215) 545-7540

Attorneys for Petitioner

(8840)

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In The

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No.

GUY DI VIAIO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Guy DiViaio, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 19, 1975.

OPINIONS BELOW

Neither the Court of Appeals for the Third Circuit nor the District Court for the District of New Jersey filed an opinion. The judgment order of the Court of Appeals is attached hereto (Appendix A, *infra* at 1a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit (Appendix A, *infra* at 1a) was entered September 19, 1975. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the power to authorize a wiretap application, expressly limited by 18 U.S.C. §2516(1) to the Attorney General of the United States or an Assistant Attorney General specially designated by him, may be validly exercised by the Deputy Attorney General in the absence of the Attorney General of the United States?

2. Whether consecutive prison sentences were improperly and unconstitutionally imposed?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

18 U.S.C. §2516

> "(1) The Attorney General, or any Assistant Attorney General specially designated by the

> Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . . ."

28 U.S.C. §508

> "(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General."

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, the petitioner was convicted on two counts of an indictment charging conspiracy to manufacture, distribute and possess a controlled substance. He was sentenced to a term of ten years' imprisonment and five years' parole on Count I and to a term of five years' imprisonment and two years' parole on Count II, to be served consecutively to the sentence imposed on Count I. The Court of Appeals affirmed by judgment order (Appendix A, *infra* at 1a).

Much of the government's evidence at the trial consisted of conversations intercepted and recorded pursuant to court orders

issued under the authority of 18 U.S.C. §2510, *et seq.* Prior to trial the petitioner filed a motion to suppress pursuant to the provisions of 18 U.S.C. §2518(10)(a) on the ground, *inter alia*, that the authorization to apply for the interception orders was invalid. The authorizations to apply for authority to intercept were in this case approved by Richard G. Kleindienst on March 31 and April 20, 1972, on which dates Mr. Kleindienst was Deputy Attorney General. From March 2, 1972 to June 12, 1972, Mr. Kleindienst considered himself "Acting Attorney General" and as such approved the requests (Affidavit of Mr. Kleindienst, Appendix B, *infra* at 3a). Attorney General John N. Mitchell had resigned on March 1, 1972.

The indictment in this case contains four counts, each alleging a conspiracy under 21 U.S.C. §846 to manufacture, distribute and possess a controlled substance under §841(a)(1) and §812(c) (App. 8a)[1]. Count I relates to heroin and codeine (Schedule I controlled substances) and charges the petitioner and named co-conspirators, Marino, King, Miller, Ashad, Carroll, Class, Jasper and Paul with conspiracy from November 16, 1971 to November 29, 1972. Count II relates to phencyclidine (Schedule III controlled substance), and charges the petitioner and already named co-conspirators, King and Marino, and additionally named co-conspirators, Baisch, Cutler and Novick, with conspiracy from April 12, 1972 to April 28, 1972. Count III relates to metamphetamine (Schedule III controlled substance) and identifies but does not charge petitioner as a co-conspirator with charged defendants, Marino, King, Novick, Miller and Carroll and additional defendants, Baker and two John Does, the conspiracy being from March 24,

1. References to "App." followed by a numerical and letter "a" page reference are to the Appendix filed in the Court of Appeals.

1972 to July 22, 1972. Count IV relates to marihuana (Schedule I controlled substance) and charges the petitioner and the already named defendants, Marino, King, Class and Baisch with conspiracy from April 19, 1972 to May 4, 1972. Count IV was dismissed on the application of the government.

The case against the petitioner, who was tried alone, consisted principally of the testimony of one Vincent DeStefano, a federal drug enforcement agent who was acting in an undercover capacity, and a series of tapes of telephone conversations of the petitioner. DeStefano first met the petitioner, particularly in connection with the attempts to obtain a source of heroin, cocaine and marihuana, and he was privy to virtually all the projects of the petitioner, who was interested in all controlled substances. The relationship of DeStefano, petitioner, Marino and others continued until petitioner was jailed on July 22, 1972.

Although the trial judge instructed the jury to consider each count separately, the jury was also instructed that

> "It is sufficient if the Government proves that the defendant presently before you came to *an express or implied meeting of the minds* with any one of the other alleged conspirators *that they would commit such acts as are alleged in counts 1 and 2 of the indictment*" (App. 591a). (Emphasis supplied.)

The jury returned verdicts of guilty on each of the two counts, and the district court imposed the consecutive sentences previously stated.

REASONS FOR GRANTING THE WRIT

I.

The first question posed by this petition seeks a further clarifying determination of the grant of power to authorize applications for interception of communications by 18 U.S.C. §2516(1). In *United States v. Giordano*, 416 U.S. 505 (1974), this Court held that the statutory grant of authority was intentionally, deliberately and purposefully restricted by Congress to "the Attorney General, or any Assistant Attorney General specially designated by him" and it expressly rejected the validity of the exercise of that power by other officials of the Department of Justice by virtue of the operation of 28 U.S.C. §509 and §510. The instant case deals specifically with the right of an officer of the Department of Justice, the Deputy Attorney General, who is not named in §2516(1), to exercise the power reposed by that statute exclusively in the "Attorney General, or any Assistant Attorney General specially designated by him," solely because of the absence of the Attorney General and his failure to specially designate an Assistant Attorney General to exercise the power. The government sought to validate the action of the Deputy Attorney General upon 28 U.S.C. §508. Such interpolation is inconsistent with the express provisions of §2516(1) and with the conclusion that §2516(1), "fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." *United States v. Giordano, supra,* 416 U.S. at 514. Congress, hardly unaware of the position of Deputy Attorney General, chose to exclude that officer.

The question raised by the instant case, therefore, has the same importance and far-reaching effect as that in *United States v. Giordano*, and in the companion case, *United States v. Chavez*, 416 U.S. 562 (1974). The reasons for granting the writ in those cases would apply here.

Moreover, in *United States v. Acon*, 513 F.2d 513 at 516, fn. 10 (1975), the United States Court of Appeals for the Third Circuit expressly declined to follow the decision of the United States Court of Appeals for the First Circuit in *United States v. Pellicci*, 504 F.2d 1106 (1974), *cert. denied*, 419 U.S. 1122, which upheld the hierarchical devolution of the power contended for by the government. In the instant case, the panel of the Court of Appeals for the Third Circuit before whom the case was listed entered a judgment order without indicating any reason for its departure from the previous determination in *Acon*. Such superficial treatment ought not to be permitted to result in the exercise of what this Court has recognized to be the awesome power of approving electronic surveillances. The strict language of §2516(1) ought not to be permitted to be swept into the generality of §§508, 509, and 510 in order to confer a convenience to the Department of Justice which Congress itself did not choose to subserve.

II.

The second question posed by this petition seeks a resolution by this Court of an issue of practical importance in the administration of the criminal laws of the United States and the measure of the government's power to impose double punishment in violation of the Fifth Amendment. The

proposition of the government that it can fractionalize one conspiracy into several based on the drug involved is totally inconsistent with the principle declared by this Court in *Braverman v. United States*, 317 U.S. 49, 53 (1959): "Whether the object of a single agreement is to commit one or more crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several conspiracies because it envisages the violation of several statutes rather than one." And if there was but one crime, only one punishment can be imposed. *United States v. Honneus*, 508 F.2d 566, 570 (1 Cir. 1974).

The record in this case would support the determination that there was but one conspiracy which was concerned with different controlled substances. See Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L.J. 513 (1949).

Even if it is proper, as *Honneus* suggests, to state the accusation against the petitioner in separate counts, it cannot be concluded that the jury necessarily found two independent conspiracies. The instructions given to the jury permitted it first to determine that there was a conspiracy, and then to determine guilt or innocence under each count by determining whether the particular drug referred to in the count was involved. In such circumstances, the imposition of consecutive sentences upon each count constitutes multiple punishment in violation of the Fifth Amendment.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Steven G. Wolschina
s/ Jacob Kossman
Attorneys for Petitioner

APPENDIX A — JUDGMENT ORDER OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1257

UNITED STATES OF AMERICA

v.

FRANCOIS ASHAD, et al.,

Guy Di Viaio, Appellant

(Cr. No. 124-73, D. N.Y.)

Argued September 17, 1975

Before SEITZ, Chief Judge, ROSENN and GARTH, Circuit Judges.

After considering the contention raised by the appellant, to-wit, that (1) wiretap evidence used against him was obtained without compliance with statutory procedures; (2) the indictment should have been dismissed because of a plea bargain in the Western District of New York; (3) prosecution of the indictment violates the guarantee against double jeopardy; (4) consecutive sentences on Counts I and II constitute multiple

punishment in violation of the Double Jeopardy clause; and (5) the evidence was insufficient to sustain a conviction; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/ Seitz
Chief Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn
Clerk

DATED: SEP. 19, 1975

APPENDIX B — AFFIDAVIT OF RICHARD G. KLEINDIENST

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

GUY J. DIVIAIO

No. 124-73 Criminal

District of Columbia:

Richard G. Kleindienst, being duly sworn, deposes and says: From June 12, 1972 until May 25, 1973, I was the Attorney General of the United States. From March 2, 1972 until June 12, 1972, I had been the Acting Attorney General of the United States.

On March 31, 1972, I approved a request for authority to apply for an interception order in this case with respect to a telephone line used by Guy J. Diviaio and others at 451 Crystal Lake Avenue, Haddon Township, New Jersey, and personally signed a memorandum of that date reflecting this approval. On April 20, 1972 I approved a request for authority to apply for an order authorizing the continued interception of the same telephone line and again personally signed a memorandum of

that date reflecting this approval. I have examined xerox copies of the originals of these memoranda each of which are annexed hereto as Exhibits A and B, respectively, and certify that each bears my signature personally affixed by me on March 31, 1972 and April 20, 1972 respectively.

s/ Richard G. Kleindienst
RICHARD G. KLEINDIENST

Subscribed and sworn to before me
this 26th day of September, 1973
s/ (illegible)
My Commission expires June 30, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-589

GUY DI VIAIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that evidence obtained by wire interception was improperly admitted at his conspiracy trial because the application for a court order authorizing the interception was approved by the Acting Attorney General of the United States. He further contends that he was improperly sentenced to consecutive prison terms on two conspiracy counts.

Petitioner was tried alone before a jury in the United States District Court for the District of New Jersey. He was convicted of two counts of conspiring to possess and distribute controlled substances, in violation of 21 U.S.C. 846. The first count charged petitioner and defendants Class, Marino, Carroll,

Jasper, Paul, and Ashad with conspiracy to possess and distribute heroin and cocaine. The second count charged petitioner and defendants King, Marino, Cutler, Baisch, and Novick with conspiracy to possess and distribute phencyclidine. The bulk of the government's case consisted of testimony from an undercover narcotics agent of the Drug Enforcement Administration, Vincent DeStefano, and telephone conversations recorded pursuant to court orders issued under the authority of 18 U.S.C. 2510, *et seq.* The applications for the court orders were approved by Richard Kleindienst who was, at the time, Acting Attorney General of the United States (Affidavit of Mr. Kleindienst, Pet. App. B, pp. 3a–4a).

Petitioner was sentenced to ten years' imprisonment and five years' parole on count 1, and five years' imprisonment and two years' parole on count 2, the sentences to run consecutively. The court of appeals affirmed (Pet. App. A, pp. 1a–2a).

1. Petitioner contends (Pet. 6–7) that the Deputy Attorney General, while serving as Acting Attorney General during a vacancy in that office (see 28 U.S.C. 508(a)), is without power under 18 U.S.C. 2516(1) [1] to authorize an application for a court order permitting a wire interception. Although the Deputy Attorney General is not specifically named in Section

[1] 18 U.S.C. 2516(1) provides in pertinent part: "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant * * * an order authorizing or approving the interception of wire or oral communications * * *."

2516(1), he is appointed by the President, by and with the advice and consent of the Senate (28 U.S.C. 504), and is therefore "responsive to the political process" (*United States* v. *Giordano*, 416 U.S. 505, 520). When the office of the Attorney General is vacant, the Deputy Attorney General exercises "all the duties of that office" (28 U.S.C. 508(a)) and is the "senior officer in the Department" (*United States* v. *Giordano, supra*, 416 U.S. at 521). The objective of 18 U.S.C. 2516(1)—to "centralize and limit" the authority to approve wiretap applications (416 U.S. at 523)—is fully satisfied when the application is personally approved by the Deputy Attorney General in his capacity as Acting Attorney General. *United States* v. *Curreri*, 363 F. Supp. 430, 434 (D. Md.); *United States* v. *Lucido*, 373 F. Supp. 1142, 1145 (E.D. Mich.). See also *United States* v. *Pellicci*, 504 F. 2d 1106, 1107 (C.A. 1), certiorari denied, 419 U.S. 1122.

United States v. *Acon*, 513 F. 2d 513 (C.A. 3), on which petitioner relies, is not to the contrary. The authorization order there had been signed by an Acting Assistant Attorney General "who ha[d] not been appointed by the President and confirmed by the Senate" and who therefore, in the court's view, did not "meet the Supreme Court's test of political responsiveness" (513 F. 2d at 516).[2]

2. Petitioner contends (Pet. 7–8) that the consecutive sentences imposed by the district court were

[2] The court in *Acon* concluded in any event that suppression was not required because it found that, while the authorization order had been signed by an Acting Assistant Attorney General, the Attorney General had personally approved the application (513 F. 2d at 516–519).

improper because "[t]he record in this case would support the determination that there was but one conspiracy which was concerned with different controlled substances" (Pet. 8). The evidence, however, established the existence of two discrete conspiracies involving different agreements among different persons at different times. That petitioner, an active participant in both conspiracies, may have been "interested in all controlled substances" (Pet. 5) does not mean that the separate conspiracies he entered into in furtherance of his "interests" amount only to a single crime.

Petitioner's assertion (Pet. 8) that the district court's instructions permitted the jury to find a single conspiracy involving separate drugs is groundless. The single sentence of the instructions on which petitioner relies (see Pet. 5) does not imply that the jury may find guilt as to both counts if it determines that petitioner reached an agreement with any of the persons named in *either* count. The point of the instruction, viewed in context,[3] is simply that, with

[3] The sentence must read together with the preceding sentence (C.A. App. 591a): "Thus, when I say the Government must prove that the defendant entered into an illegal agreement, I do not mean that he must be shown to have met and talked with each of the other alleged conspirators, nor is it necessary that the Government prove that each and every one of the other named individuals actually agreed to participate in a common undertaking. It is sufficient if the Government proves that the defendant presently before you came to an express or implied meeting of the minds with any one of the other alleged conspirators that they would commit such acts as are alleged in Counts 1 and 2 of the indictment."

respect to each count separately, the essential element of an agreement to do an unlawful act may be satisfied by proof that petitioner made such an agreement with any of the individuals named in that count. The court left no doubt that the two counts required separate consideration. It stated (C.A. App. 606a):

> Now, you will keep in mind during the course of your deliberations that there are two counts contained in the indictment, Counts 1 and 2. Each of these counts is to be judged by you separately. You may find the defendant guilty of both counts or not guilty of both counts or guilty of one and not guilty of the other, depending upon what you as the sole judges of the facts find those facts to be.

Petitioner's counsel stated at the completion of the instructions that "[t]he defense has no exceptions to the charge" (C.A. App. 609a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1976